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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 VS. ) **NO. CR 17-0533 EMC**  
 )  
 JONATHAN NELSON, et al., )  
 )  
 Defendants. )  
 )

San Francisco, California  
Friday, May 1, 2020

**TRANSCRIPT OF ZOOM WEBINAR PROCEEDINGS**

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Friday - May 1, 2020

1:31 p.m.

P R O C E E D I N G S

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**THE CLERK:** Calling criminal action 17-533, United States of America versus Jonathan Joseph Nelson, Raymond Michael Foakes, Russell Allen Lyles, Jeremy Daniel Greer, Brian Wayne Wendt, Russell Taylor Ott, Christopher Ranieri, Damien Cesena, Brian Allen Burke, David Salvatore Diaz and Merle Frederick Hefferman.

Counsel, please state your appearances for the record beginning with Government's Counsel.

**MR. BARRY:** Good afternoon, Your Honor, Kevin Barry and Ajay Krishnamurthy for the United States.

**THE COURT:** All right. Good afternoon, Mr. Barry.

**MR. BUSTAMANTE:** Good afternoon, Your Honor, James Bustamante appearing on behalf of Mr. Hefferman.

**THE COURT:** All right. Good afternoon, Mr. Bustamante.

**MR. BOISSEAU:** Good afternoon, Your Honor, George Boisseau on behalf of Mr. Foakes.

**THE COURT:** All right. Thank you.

**MR. CLOUGH:** Good afternoon, Your Honor, Michael Clough appearing on behalf of Mr. Lyles.

**THE COURT:** All right. Great. Thank you.

(Unidentified person speaking.)

**MR. NOVAK:** Richard Novak for John Nelson.

**THE COURT:** Wait. Who is that speaking?

**MR. NOVAK:** That was Richard Novak for John Nelson.

**THE COURT:** Someone else is speaking.

**MR. GOHEL:** This is Jai Gohel for John Nelson.

**THE COURT:** Angie, is there somebody else --

**THE CLERK:** I'm trying to locate. Who is speaking right now, please? Who was speaking?

(No response.)

**MR. NOVAK:** Richard Novak made his appearance for the John Nelson.

**MR. GOHEL:** Jai Gohel for John Nelson also appearing.

**MS. AMRAM:** Galia Amram and Whitney O'Byrne for Damien Cesena.

**THE COURT:** Thank you.

**MR. WAGGENER:** Robert Waggener and Marcia Morrissey are appearing for Russell Ott.

**THE COURT:** All right. Thank you, Mr. Waggener.

**MR. THOMSON:** James Thomson appearing for David Diaz, who I believe is also present by telephone, Your Honor.

**THE COURT:** All right. Thank you.

**MR. BABCOCK:** Erik Babcock on behalf of Brian Burke whose appearance is waived.

**THE COURT:** Okay.

**MR. WALSH:** Good afternoon, Your Honor, John Walsh on

1   behalf of Christopher Ranieri whose presence has been waived as  
2   well.

3           **THE COURT:** All right. Anybody else?

4           **MR. SABELLI:** Good afternoon, Your Honor, Martin  
5   Sabelli for Brian Wendt who is in custody.

6           **THE COURT:** All right.

7           **MR. PHILIPSBORN:** Good afternoon, Your Honor, John  
8   Philipsborn who is co-Counsel for Mr. Wendt.

9           **THE COURT:** All right. Thank you, Mr. Philipsborn.  
10   Any other appearances by Counsel?

11                           (No response.)

12           **THE CLERK:** Who is representing Jeremy Greer?

13           **THE COURT:** Ms. Pollack normally.

14           **MR. SABELLI:** It is. I can appear for her and I will  
15   text her right now as well.

16           **THE CLERK:** Thank you.

17           **THE COURT:** All right. Does that cover Counsel for  
18   each of the Defendants?

19           **THE CLERK:** Yes, Your Honor.

20           **THE COURT:** All right. And I can see in terms of the  
21   attendees that Mr. Burke, Mr. Krishnamurthy -- oh, Ms. Pollack  
22   is as an attendee. We need to --

23           **THE CLERK:** Here we go. All right. She is now a  
24   panelist.

25           **THE COURT:** All right. Can you hear us, Ms. Pollack?

**THE CLERK:** Ms. Pollack?

MS. POLLACK: Yes.

**THE COURT:** Great.

**MS. POLLACK:** You can hear me.

**THE CLERK:** Yes.

**THE COURT:** All right. The record will reflect that Mr. Lyles and Mr. Ott are also in attendance through the attendee list.

Is there any other Defendant that we know of that is attending by teleconference here?

**THE CLERK:** Your Honor, I see Mr. Burke and Mr. Cesena.

**THE COURT:** Right. I mentioned those two. Anybody else?

(No response.)

**MR. THOMSON:** Your Honor, this is James Thomson. I think Mr. Diaz is appearing by telephone as well.

**THE COURT:** Okay.

**MR. BUSTAMANTE:** Your Honor, I believe that Mr. Hefferman is attending by telephone as well.

**THE COURT:** All right. With respect to the others, their appearances are waived, correct, Counsel?

**MR. NOVAK:** That's correct as to Mr. Nelson.

**MR. WALSH:** Correct as to Mr. Ranieri, Your Honor.

**MR. CLOUGH:** Your Honor, I think Mr. Lyles is on.

1           **THE COURT:** All right. Yes, Mr. Lyles is on.

2           **MR. CLOUGH:** Thank you.

3           **THE COURT:** Correct as to Mr. Foakes.

4           **MS. POLLACK:** Your Honor, I believe, Jeremy Greer is  
5 on the line.

6           **THE COURT:** Okay.

7           **MR. SABELLI:** Yes, Your Honor, with respect to  
8 Mr. Wendt. I should note -- although it is not an issue for  
9 today -- I don't think there is a mechanism so far for the  
10 in-custody clients in Santa Rita to participate in these  
11 hearings, but we do agree to waiving his presence for today.

12           **THE COURT:** All right. There may be a way. I mean,  
13 we are -- we are having sentencings, pleas, by telephonic and  
14 video -- video is limited to Saturday mornings and Sunday  
15 mornings. Audio is available two afternoons a week, but they  
16 are limited in terms of time slots but -- and I don't know how  
17 many can participate. That's another question.

18           I think telephonically we might be able to have two,  
19 possibly three, I'm not sure; but if they want to -- if those  
20 who are detained want to participate at least telephonically,  
21 let us know and we can try to arrange that with Santa Rita in  
22 advance.

23           **MR. SABELLI:** Thank you, Your Honor.

24           **THE COURT:** Okay. All right. Is there anybody else  
25 whose appearances we have not dealt with this morning in terms



1 of the Defendants?

2 (No response.)

3 **THE COURT:** Let me reiterate that under our General  
4 Order 74 that hearings at this point cannot be conducted in  
5 person without seriously jeopardizing the public health and  
6 safety. And that in recognition of that as well as the need to  
7 go forward with the status conferences to get this case  
8 continued to progress, that's why we are holding this and not  
9 waiting for the date when we can have physical appearances in  
10 the courthouse.

11 So let's talk about where we are. I know that there has  
12 been a lot of meetings, a flurry of filings. And it appears --  
13 and, plus, we have also tried to set up a -- kind of a  
14 break-room. So if we need to go into sealed proceedings, we  
15 can go to a different meeting. I'm not sure how well that is  
16 going to work.

17 If we have to, we will have to have Angie start up another  
18 meeting that is not a webinar and, therefore, not attended by  
19 the public. There won't be any attendees. That is a private  
20 setting which replicates the court under seal.

21 So at any point if any of you think we should discuss a  
22 matter not with the public in attendance, let me know. And  
23 then we will try to make that arrangement. We did try to set  
24 up a side meeting and I'm showing it. I'm not sure whether it  
25 is easy to get there; but we will find out, I guess.

1           So I have the Government's -- or the joint status report  
2           that now lays out kind of a different timeline. And maybe I  
3           want to let -- I don't know if it's you, Mr. Sabelli or  
4           Mr. Philipsborn, who filed this explain sort of where we are at  
5           in your view.

6           **MR. SABELLI:** Thank you very much, Your Honor.

7           This is the conclusion of a meet-and-confer -- several  
8           meet-and-confers between a committee of the Defense and  
9           Government Counsel. And it lays out the substance of our  
10          communications and a joint recommendation about continuing the  
11          discussions of the trial groupings issue until mid-June and  
12          with that, the trial date issue.

13          That would allow us to also meet and confer further about  
14          a pretrial litigation schedule. We have asked to be able to  
15          have until mid-May to try to propose a joint pretrial  
16          litigation schedule to the Court.

17          That leaves pending the issue of the virtual examination  
18          of the Daubert -- rather, the virtual Daubert hearing.

19          And as noted in a separate filing that I made today,  
20          Mr. Philipsborn and I have concerns with respect to the NOI  
21          issue, the Notice Of Intent issue.

22          And I also filed a separate document regarding our  
23          concerns about the 404(b) evidence that was noticed last week  
24          by the Government -- or the earlier this week by the Government  
25          pursuant to the court order.

1       So the timeline that we suggested in this filing, Docket  
2       1042, is we come back in mid-June. There has been some  
3       discussion about what dates are available, and that's -- that's  
4       another issue; but in terms of what we suggested in the  
5       document, the joint status conference, we asked to come back in  
6       mid-June to discuss trial groupings.

7       That will give the parties a chance to not only evaluate  
8       the evidence and the notice that we received this week but for  
9       the Government to complete the process of identifying  
10      statements and to turn those statements over to the Defense.

11      The Government anticipates that that will take about five  
12      weeks. We wanted two weeks to review those statements. Hence,  
13      the seven-week timeline, which takes us to about June 19th.

14      There are availability issues for the Court and for  
15      Counsel, but somewhere in mid to late June is what we were  
16      aiming at in the document.

17      And then coming back in about ten days after meet and  
18      conferring with the pretrial schedule -- about a pretrial  
19      litigation schedule, that is something that we might be able to  
20      do without a court appearance; but that is not something that  
21      that was discussed with the Government, whether or not we would  
22      need a court appearance for that. So that's where we are at,  
23      Your Honor.

24               **THE COURT:** Now, the pretrial schedule that is  
25      something in terms of laying out what we talked about before,

1 the different waives of Daubert hearings and other motion work?

2 **MR. SABELLI:** Yes, Your Honor. At the end of the last  
3 hearing when we were discussing what we should do at the  
4 meet-and-confer, the Court said: Why don't you meet and confer  
5 about motions to suppress and other motions.

6 And so we have attempted to do that, but in light of  
7 the -- of the disclosures and the progress of the  
8 meet-and-confer, we all felt that we needed more time to do  
9 that. And so that's why we asked for additional time for that.

10 **THE COURT:** Now, is that pretrial litigation schedule  
11 something that can be suggested independent of the actual trial  
12 date because when you are talking about sort of later May to  
13 come up with that, but we are not meeting until presumably  
14 mid-June to talk about trial dates and groupings; that still  
15 can go forward in your view?

16 **MR. SABELLI:** Well, Your Honor, we didn't discuss that  
17 explicitly, and there may be different positions on that.

18 Certainly coming up with a pretrial litigation schedule  
19 completely without a sense of trial dates has some inherent  
20 problems in it.

21 So we can -- there may be certain litigation that we can  
22 schedule and certain litigation that we can't schedule without  
23 a trial date. That's why we asked for more time so that we  
24 could sit down and try to work some of those things out. Keep  
25 the case moving. Schedule motions that can be scheduled. And

1 the ones that can't be scheduled without a trial date, we won't  
2 be able to do.

3 **THE COURT:** All right. Well, I think it does make  
4 sense at the very least to have a sequence of what -- we can  
5 all agree on a sequence of motions and sequence of things that  
6 have to happen, and we can adjust the spacing depend on what  
7 the trial date is.

8 I do think it makes sense to try to at least lay out a  
9 structure with some suggested dates where you can. So I would  
10 endorse that.

11 **MR. SABELLI:** Yes, Your Honor. And I'm not speaking  
12 for anybody else now except for Mr. Philipsborn or I. But we  
13 filed the 404(b) statement because we anticipate bringing  
14 litigation regarding 404(b) in the near future, and that would  
15 be independent of a trial date.

16 So there may be some motions of that that can be brought  
17 without having a trial date that we can work out a schedule for  
18 in short order.

19 **THE COURT:** All right. Anybody else have any thoughts  
20 on that question?

21 **MR. WAGGENER:** Robert Waggener speaking for Mr. Ott.  
22 On the 404(b) issue I think that is an issue which is -- goes  
23 beyond Mr. Wendt. So I think that the Ott team -- and I  
24 suspect a number of other lawyers will also have some positions  
25 to take regarding the 404(b) evidence as being offered by the

1 government.

2 **MR. WALSH:** Your Honor, John Walsh on behalf of  
3 Christopher Ranieri. I join in with Mr. Waggener's remarks as  
4 well as Mr. Sabelli's on the 404(b) evidence.

5 **MR. NOVAK:** Your Honor, Richard Novak for Mr. Nelson.  
6 I think for obvious reasons we will be addressing the same  
7 issues in some pretrial motion in the very near future.

8 **MR. GOHEL:** Your Honor, this is Jai Gohel for John  
9 Nelson. I think the issue is that the 404(b) evidence, without  
10 going into specifics, could have a significant impact, rulings  
11 on that, with respect to -- at least our position is it could  
12 affect the trial groupings.

13 **MR. CLOUGH:** Your Honor, Michael Clough on behalf of  
14 Mr. Lyles. There are some unique issues relating to  
15 Mr. Lyles -- I think the Court has some knowledge of that we  
16 can't talk about in an open session -- but I will be meeting  
17 and conferring with Mr. Barry and try to figure out how to  
18 merge the motions I anticipate filing with the rest of the  
19 schedule.

20 **THE COURT:** All right. Well, I don't know if we have  
21 to --

22 **MR. THOMSON:** Your Honor, this is James Thomson. I  
23 don't know if you want every one of us to kind of join in with  
24 what Mr. Waggener started, but we are all on 404 I think.

25 **THE COURT:** I understand that. So this is just an

1 illustration of the kind of matters that we want to try to  
2 schedule in sequence at least.

3 So regardless of the trial date, that we can move forward.  
4 Whether it is a 404(b) motion, motion to suppress, Daubert  
5 hearings, whatever it is, I do want to keep moving and  
6 irrespective of whether we have -- what the trial date is going  
7 to be and what the trial grouping is.

8 I would like the parties to meet and confer and -- by,  
9 let's say, mid-May. See if you can come up with a proposed  
10 schedule.

11 **MR. SABELLI:** Yes, Your Honor.

12 **THE COURT:** That gets us through the next several  
13 months. I think that makes a lot of sense.

14 **MR. THOMSON:** Yes, Your Honor.

15 **THE COURT:** Everyone agrees with that; that we need to  
16 do something like that?

17 **MR. WALSH:** Yes, Your Honor.

18 **MR. SABELLI:** Yes, Your Honor.

19 **MR. BOISSEAU:** Yes, Your Honor.

20 **MR. THOMSON:** Yes, Your Honor.

21 **THE COURT:** That leaves a question about the  
22 Daubert -- at least the first waive, the enterprise Daubert  
23 hearing. The statement I received suggests that we could  
24 discuss this issue about whether we can have a virtual hearing  
25 and whether attendance is required or not.

1       There is a suggestion here that it might be prudent to  
2 postpone that in light of General Order 72 and the whole  
3 question of trial groupings. I would like to hear your  
4 thoughts about whether we should try to address that now or  
5 defer and see where it takes us.

6       I mean, it is true that the General Order has now put us  
7 through June 1st, this court. We don't know what is going to  
8 happen after that, but there is a possibility that things will  
9 begin to open up and certain proceedings -- particularly in the  
10 criminal arena -- may recommence; but I don't know that. I  
11 don't know if anybody knows that at this point. But I would  
12 like to hear your thoughts about timing with respect to the  
13 handling of the Daubert hearing.

14       **MR. THOMSON:** Your Honor, this is James Thomson on  
15 behalf of Mr. Diaz, who was joined by Mr. Hefferman and Mr.  
16 Ott, with respect to our position and our suggestion that it  
17 might be prudent to wait and address this matter at the next  
18 calling of the case only because of the fact of the extension  
19 of the general order and also the fact that there is at this  
20 point in time no available mechanism for the video type hearing  
21 that we were talking about.

22       If there is no availability for that, then that's kind of  
23 going to moot the issue. I don't know whether the Court wants  
24 to make a ruling on an issue that may not come to light which  
25 is the right to be present or not if there is no way to



1 actually be present.

2 So -- we just thought, the three of us at least -- thought  
3 that it would be better -- or it might be better -- I mean, it  
4 is the Court's call obviously -- but it might be better to wait  
5 until the next calling of the case to address this issue. Or  
6 if something were to happen in the interim, we could notify the  
7 Court, either in a status report or in some sort of pleading,  
8 about some change that would cause us to suggest that the Court  
9 should make a ruling earlier.

10 **THE COURT:** All right. What about for Mr. Wendt? I  
11 mean, since it sounds kind of like a moving force for getting  
12 this going. What is your view at this point about timing?

13 **MR. SABELLI:** Your Honor, we have not been able to  
14 identify a mechanism for holding the hearing. We have  
15 attempted -- Mr. Philipsborn and I have attempted to research  
16 the issue. We would like to keep the case moving. We believe  
17 that this issue in particular, given the scope of the  
18 Government's proffer, is of fundamental importance and needs to  
19 be defined sooner rather than later.

20 As of now we have not identified an adequate mechanism for  
21 getting this done. So we will continue to look for that  
22 mechanism.

23 We believe, as do all the Defendants, that -- I'm sorry --  
24 all Counsel that the Defendants need to be effectively present  
25 at a hearing. We differ about what "effective presence" means.

1       We have suggested the conditions that are necessary for  
2       that, but we just haven't found a way to make that real yet.  
3       So we will continue to look for that. We can alert the Court,  
4       as Mr. Thomson said. But so far, we have not been able to  
5       identify a way to have this done in the short-term.

6               **THE COURT:** Well, when you say there is not a  
7       mechanism, it sort of begs the question in terms of what is  
8       required either under Rule 43 or by constitution.

9       And if I were to determine that a physical presence is not  
10      required but that, for instance, your -- out of your five  
11      conditions, the first four can be met, I think there is a way.

12      So it sort of begs the question -- depends on what it is  
13      that is constitutionally adequate and do we have what is  
14      necessary to make that happen. We can certainly have witnesses  
15      examined. We can have documents looked at through this  
16      mechanism, for instance -- through Zoom and there are some  
17      other ones as well.

18      And, in fact, I'm prepared and we are going forward with a  
19      bench trial in a fairly complicated civil case involving about  
20      ten experts. We are scheduled to do that on June 8th all by  
21      Zoom, but you know how that goes.

22      It is the presence of the Defendants that gets tricky.  
23      Particularly those -- those who are not detained, they can  
24      participate as some of them are now. Those who are detained,  
25      it gets a little trickier. There is a way to video conference

1 in, but very hard to get blocks of time -- like six hours block  
2 of time. That may be possible. I don't know.

3 So that -- the question is: Should we confront the issue  
4 now and be prepared to go forward one way or another or should  
5 we wait, for instance, until June when our general order, at  
6 least the current one, expires and we will see where we are at.  
7 And maybe we will have live hearings at that point.

8 And part of the timing question -- because what was  
9 driving an expedited Daubert hearing was a need to get that  
10 resolved as the front load of the other Daubert issues in order  
11 to prepare for a December 2020 trial date.

12 So we have got a lot of things kind of plugging in pieces  
13 of the puzzle here. So that's why I wanted to get particularly  
14 Mr. Wendt's view since he really wanted to move forward at  
15 least initially with the -- with an early trial date.

16 **MR. SABELLI:** Yes, Your Honor.

17 I do want to say one thing in reaction to the Court's  
18 comments. I would lean very heavily in terms of our conditions  
19 on the ability to consult with Counsel regarding the direct  
20 examination and with other co-Counsel and all the accused being  
21 able to speak to their Counsel.

22 Not only is it necessary for the accused to listen and see  
23 the witness, but we also have to meet with them and go over the  
24 transcript and the video. So that's part of the process that  
25 we have not been able to resolve.

1 And as I understand it, the Government doesn't have a  
2 suggestion about how we can do that. There is very limited  
3 availability in terms of conferencing with the in-custody  
4 clients.

5 So if I heard the Court correctly, it is going to dip its  
6 toe in the water at the beginning of June with the complex  
7 civil trial in an expert-heavy environment.

8 And if that's the case, the Court may develop experience  
9 in the beginning of June that would be relevant to this  
10 inquiry. We have not found a way to meet our conditions, and  
11 we believe those are the conditions for effective presence.

12 And I want to underscore the importance of this particular  
13 hearing and the importance of consulting with our clients given  
14 the nature of the expertise here. We are not talking about a  
15 DNA expert or something like that with a non-DNA expert client  
16 who can't add much to it.

17 This is a situation where the Government's allegations  
18 alone suggest that the Defendants can effectively participate  
19 in the preparation for the cross-examination.

20 **THE COURT:** Let me ask you one of your conditions -- I  
21 understood the idea of having direct testimony pausing if your  
22 client can and then going over that to find out, you know, talk  
23 about -- you know, the results of that direct and what is  
24 faulty, et cetera, et cetera; and then prepare for the cross.

25 But you say you want an opportunity to present the video.

1 And that's where one, I have -- I have a question. Well, what  
2 does that add? What does a client bring -- I understand the  
3 client may bring some substantive comments about the  
4 inaccuracies, for instance, of some of the opinions and  
5 observations of one or both of the experts; but to review the  
6 video in addition to the transcript, I'm not sure I get that.

7 **MR. SABELLI:** Your Honor, I think it is much easier to  
8 digest and understand testimony and the emphasis of testimony  
9 with a video presentation.

10 I understand, of course, that a transcript and a  
11 sufficient opportunity to review the transcript and discuss it  
12 with Counsel -- not just review it but actually work through it  
13 with Counsel the way we would, you know, pre-COVID days, that  
14 is essential.

15 It is not just the client reading it. It is being able to  
16 talk to the client about it and work through what we are going  
17 to do on cross. That is essential.

18 The Court may find that the video is unnecessary if there  
19 is a transcript, and we have sufficient time to review that  
20 transcript with the client. That is one possible outcome of  
21 the Court's analysis.

22 **THE COURT:** And is there an impediment if you had the  
23 transcript in hand -- I know access is difficult especially  
24 with the COVID situation. Is there a problem getting access to  
25 the client, enough time to -- I don't know how many hours you

1 need. But are they allowing meetings at Santa Rita that can --

2 **MR. SABELLI:** We have meetings and Mr. Philipsborn and  
3 I have jumped on every opportunity. We get an hour a week.

4 **THE COURT:** They only allow one hour a week?

5 **MR. SABELLI:** I have not made an inquiry as to whether  
6 or not we could have a six-hour block or -- you know, putting  
7 aside the effectiveness of the six-hour jail meeting, which is  
8 something that psychologists would laugh at, I think; but my  
9 understanding is we do not have anything like that kind of  
10 access. We get a slot on a weekend. It is a Saturday or a  
11 Sunday.

12 **THE COURT:** Okay.

13 **MR. SABELLI:** For now.

14 **THE COURT:** All right. And but you could get the  
15 transcript to Mr. Wendt; right? I mean he can -- trial  
16 transcript -- hearing transcript?

17 **MR. SABELLI:** I believe we could, yes.

18 **THE COURT:** Let me ask another question. I don't want  
19 to get too deep into the merits yet of the ultimate question  
20 about the constitutionality of the -- of a bifurcated or  
21 trifurcated semi-virtual Daubert hearing.

22 But one thought occurred to me. One thing we are doing in  
23 the civil case is the parties have stipulated to have the  
24 direct testimony made not on the stand but by way of an  
25 affidavit, which actually is quite common in many areas where

1 you would have the full testimony but in affidavit form.

2 And it occurred to me that that might be an efficient way  
3 to proceed. I would like the Government's reaction to that.  
4 Rather than -- you know, this is not a jury trial. We don't  
5 need the drama of putting somebody on the stand and having them  
6 testify on direct especially if it is an expert. And given the  
7 disclosures that have already been made, I mean, what about  
8 having that direct testimony in the form of an affidavit so we  
9 don't have to have a trial and stop?

10 We could simply then present that affidavit, and then we  
11 would have an evidentiary hearing for cross and then redirect  
12 and recross?

13 **MR. BARRY:** Your Honor, this is Kevin Barry for the  
14 Government.

15 So there is a problem with the way the Defense is sort of  
16 pitching this in that this is not -- you know, the idea of  
17 having expert evidence through affidavits and having a battle  
18 of the experts is a trial issue.

19 One of the reasons that the Defendants' presence isn't  
20 necessary for the Daubert hearing is because it doesn't matter  
21 whether the opinions proposed by the experts are accurate for  
22 the purposes of Daubert.

23 If the Defendants can say to their client -- to their  
24 lawyers that what the -- what the expert is saying about the  
25 Hells Angels is dead wrong. That is not what the Hells Angels

1 do. Nobody was at that run or that run didn't take place or  
2 that is not the structure. That is not the way things go.  
3 That does not matter at a Daubert hearing. The only issue for  
4 the Daubert hearing is the bases for those opinions.

5 An example of a DNA expert would be the DNA expert could  
6 have tested the swab from the gun and concluded and developed a  
7 match, you know, developed a genetic profile. That conclusion  
8 can be completely wrong, and the Defense experts would say  
9 that. No. What you did was you didn't do the extraction  
10 correctly. But that's not a challenge at a Daubert hearing.

11 The only DNA -- the only challenge for DNA for a Daubert  
12 hearing is if there was some novel means of say using a complex  
13 mixture.

14 So the Defense -- the Government expert can be 100 percent  
15 wrong on the facts with respect to the opinions, but that is  
16 not what the Court is doing at the Daubert hearing.

17 All that -- all that happens at the Daubert hearing for an  
18 enterprise expert is what is your basis for opinions. And we  
19 submit that the Defense has that bases.

20 The Court has enough information to say that this expert  
21 is not simply a highway patrol officer who stopped the Hells  
22 Angels three times and is going to offer an opinion about all  
23 these things.

24 That is the -- that is sort of the key for the enterprise  
25 Daubert. It is does this person know enough about the



1 enterprise and how do they know that. And so, again, it  
2 doesn't matter whether what they say about the enterprise is  
3 right or wrong.

4 So the idea of having -- you know, the Defense has  
5 basically the expert testimony in the form of the lengthiest  
6 enterprise disclosure I think anyone can ever point to.

7 So the key question is going to be, you know, what  
8 cross-examination is there. You know, the direct is probably  
9 going to just be, you know, regurgitation of the person's  
10 qualifications and all the things that they have done.

11 And it is also possible in the context of Daubert for the  
12 Court to say: I have heard enough. I don't need any  
13 cross-examination. I believe that this expert either doesn't  
14 have enough or has enough without the need for any Defense  
15 cross-examination at all.

16 So my -- the issue that the government takes with the --  
17 sort of the procedures that have been proposed especially with  
18 this -- you know, the Defense need to have their clients right  
19 there and maybe the bifurcated procedure, it is not necessary  
20 for this.

21 As a practical matter, we are -- the Government is fine  
22 with waiting because, you know, even if there is a Daubert  
23 hearing and a conclusion in October with a December 2020 trial  
24 date -- assuming that date sticks -- even if there is a  
25 decision in October, that won't compromise anyone either way.

1       The Government, you know, is preparing either way. If the  
2       Defense gets a -- you know, an order saying that it is  
3       admissible, then there is no surprise because they know very  
4       well exactly what is the timeline.

5               **MR. SABELLI:** Your Honor, what Government Counsel is  
6       not focusing on is the lack of reliability issue and the other  
7       bases for exclusion. So it is possible, for example -- just to  
8       give a very concrete example -- that their expert were to say:  
9       I came to X conclusion based upon the statements of informants  
10      1, 2 and 3.

11      And our clients could give us information, once that is  
12      revealed, that would allow us to attack the reliability of the  
13      opinion based -- that is being proffered.

14      There are also other bases for excluding expert --  
15      quote-unquote, enterprise expert opinions that our clients  
16      could, just based upon the allegations that the Government  
17      makes against our clients, be able to assist us in preparing.

18               **THE COURT:** Let me ask you for a second. Let's take  
19      your example. An opinion based on informants 1, 2 and 3  
20      reaching X conclusion. Your client gives you information that,  
21      no, the informants 1, 2 and 3, you know, didn't say that or  
22      they don't exist or they got the wrong persons.

23      So then you have competing testimony. You have the expert  
24      saying: Yes, I did talk to informants 1, 2 and 3. This is  
25      what they told me.

1           And then you have a cross that says: No -- that suggests  
2           you -- no, you didn't have -- you didn't hear that or you  
3           didn't have 1, 2 or 3. Isn't that an issue for trial?

4           I mean, am I supposed to make a credibility determination  
5           at that point? It seems like the question is: Is the asserted  
6           basis one that is -- one upon which experts can rely and is  
7           reliable. It's not clear to me at this point that I'm supposed  
8           to determine a credibility issue at this point when an expert  
9           says: I talked to Y or Z.

10           **MR. SABELLI:** Your Honor, first, I want to remind the  
11           Court that the Government itself in filing -- in a filing  
12           suggested to the Court that it needed to supplement its own  
13           reliability showing through the direct examination. So the  
14           Government has taken that position that it has not sufficiently  
15           established the reliability of its experts.

16           But putting that aside, number one, I do agree that the  
17           Court should make a credibility determination; but that's not  
18           really what I was driving at. What I was driving at is  
19           something different. The expert -- because of something that  
20           our client helps us with, we are able to show that a basis of  
21           an opinion is not a reliable basis.

22           For example, our client tells us this guy was never a  
23           member of the club or this person has a felony conviction for  
24           perjury or this person was out of the country then. And then  
25           we are able to confront their expert based upon what our client

1 tells us with information that the expert can't -- isn't going  
2 to refute. It is simply information that the Government expert  
3 didn't have -- did not factor into their decision. And,  
4 therefore, we would be able to show the Court that the opinion  
5 that came out of that was not reliable.

6 **THE COURT:** All right. I understand. If there is --  
7 there is evidence that suggests that one of the bases  
8 indisputably is not reliable, I can understand that. My  
9 question is: What if there is a contest?

10 The expert says: Yes, this person told me they were in  
11 the -- in Hells Angels this particular year and this chapter.  
12 And you on cross suggest the contrary. It seems to me that is  
13 the classic kind of issue that is for trial.

14 I'm not sure that -- I have never had a Daubert hearing  
15 where I'm supposed to test the credibility of -- this is a  
16 gatekeeping question. It is not trial. I'm not here to  
17 determine whether or not it is a convincing expert or not.

18 **MR. SABELLI:** Your Honor, sure. It is a gatekeeping  
19 function. So it is incumbent upon the Court to be able to  
20 determine whether these opinions -- which, by the way, are  
21 extremely broad and extremely prejudicial and go to the nature  
22 of the enterprise and the existence of the enterprise --  
23 whether or not they are reliable.

24 And, furthermore, particularly with respect to the  
25 death-eligible people, there is a heightened element --

1 heightened scrutiny that is necessary here because this  
2 information is going to go to a jury that could potentially  
3 have a -- have the decision about death.

4           **THE COURT:** Well, I certainly appreciate that. I will  
5 say that the cases and the section that you cite are in  
6 opposite because those go to sentencing, not guilt phase. But,  
7 you know, I certainly appreciate that. When the gravity of  
8 these proceedings has such a consequence, of course, that's why  
9 we are trying to be as careful as we can. Well --

10           **MR. BARRY:** Your Honor --

11           **THE COURT:** Well, let me go back to my first point.  
12 That is: If what you say is true, Mr. Barry, essentially you  
13 are going to regurgitate what is already in the affidavit or at  
14 least in your proffer.

15           And I will say I think part of the problem with the  
16 proffer -- and one of the reasons why I decided to have an  
17 evidentiary hearing -- was that there were certain opinions  
18 that were -- many opinions were, the bases for which, were  
19 cited in a footnote and explained and cited; but there are some  
20 that weren't.

21           So I want to give the Government a chance to make sure  
22 that they make clear what the bases of each opinion is, which  
23 is necessary under Daubert. Because if there is no bases, that  
24 clear opinion can't stand. That's why I was going to have an  
25 evidentiary hearing. But it occurred to me, that can be done

1 by affidavit.

2 Maybe it is a little more robust than what you have done,  
3 but in some ways at least it moves the ball forward. The  
4 Defendants will see what that testimony is. We don't have  
5 to -- you know, I mean, and then they can conduct their cross  
6 accordingly.

7 **MR. BARRY:** Your Honor, I appreciate that; but let me  
8 make an additional point.

9 I would encourage the Court to go back to the disclosures  
10 and see what the opinions are. The idea that the Defense is  
11 going to be able to point to the witness and say: You only got  
12 this information from this informant. That informant is a  
13 convicted perjurer who was out of the country. That is just  
14 not going to happen.

15 As Mr. Sabelli even indicated, the opinions are broad.  
16 They are not the Sonoma County Hells Angels is a criminal  
17 enterprise, period. It is: What do the symbols mean? How are  
18 the Hells Angels constructed?

19 The opinions are the very opinions that have been blessed  
20 by other RICO cases in this district and elsewhere.

21 And so the idea is we can undercut the ability of the  
22 expert by facts that only the Defendants know have no basis. I  
23 think it will be the kind of thing that happens -- if it  
24 happens, it will be the kind of thing that happened in *Serta*  
25 (phonetic) -- where the question was, you know, you have the

1 opinion that the 19th Street Surenos deal drugs on this corner.  
2 What is your basis for that opinion?

3 And the only response was "my training experience." And  
4 Judge Alsup found that blanket training and experience citation  
5 wasn't enough for those opinions, and then those opinions were  
6 removed. But here --

7 **THE COURT:** Well, I understand your point; that we  
8 don't even need an evidentiary hearing. This is a matter of  
9 law. It is gatekeeping. I can look at the bases and see  
10 whether they are adequate or not.

11 But I'm saying if I go further than that -- and given the  
12 gravity of these proceedings -- why can't we proceed by --  
13 start with the robust affidavit, which presents all the bases  
14 you want to present, all the opinions your person wants to  
15 present; and then pick up with cross?

16 It may be that cross ought to be truncated; ought to be  
17 short. We are not going to get into, you know, credibility  
18 issues as if we were in trial. But, you know, there is kind of  
19 a fine line between -- at some point if the reliance is on  
20 something that is totally incredible, maybe there is a  
21 reliability problem. I will have to see as we get there.

22 I understand your point that you think there ought to be  
23 either no or very succinct truncated cross since it is a  
24 Daubert hearing, not trial. But we can address that when we  
25 get there.

1 But my question is: Can't we make this more efficient and  
2 move this forward by starting with presenting the direct  
3 testimony through a written -- written testimony rather than  
4 having it put on the stand and taking a transcription of it?

5 **MR. CLOUGH:** Excuse me.

6 **MR. BARRY:** It is Kevin Barry again.

7 Yes, Your Honor, I think we can do that. One of the -- it  
8 might be helpful if the Court has reviewed the disclosures.  
9 And if there are only some opinions that the Court feels don't  
10 have a robust enough explicated bases, if the Court wants to  
11 indicate these need more, we can direct an affidavit to just  
12 those opinions. That will streamline and truncate things quite  
13 nicely.

14 **THE COURT:** Well --

15 **MR. SABELLI:** Your Honor, I want to remind the Court  
16 that this is not --

17 **MR. BARRY:** Your Honor, this is --

18 **THE COURT:** Hold on. One at a time. Let Mr. Barry  
19 finish.

20 **MR. BARRY:** This is a decision for the Court in its  
21 gatekeeping function. And if Your Honor looks and says:  
22 Enough for these 13 and these 7 need more, yes, we can  
23 certainly do an affidavit for those and fill that in.

24 **THE COURT:** Yeah, well, I think that would be  
25 abandoning my role as a neutral arbiter. I'm not here as a --



1 I think each party has to present their best case.

2 Mr. Sabelli, you had a comment.

3 **MR. SABELLI:** Yes, I'm sorry. I didn't realize  
4 Mr. Barry hadn't finished. I'm sorry, Mr. Barry.

5 We have been back and forth on this issue three times by  
6 my counting. And the Government has been warned by Judge  
7 Beeler and by this Court that it had to make a showing. And if  
8 not, it was on the Government. And now what appears to be  
9 happening is the Government is requesting another opportunity  
10 to do what it has been given three opportunities to do in the  
11 past. And that is --

12 **THE COURT:** Well, wait a minute. That's not fair. I  
13 said we are going to have an evidentiary hearing. You wanted  
14 an evidentiary hearing.

15 **MR. SABELLI:** Yes.

16 **THE COURT:** Obviously we are going to have a chance to  
17 put on testimony by direct. All I was suggesting was why not  
18 do it by affidavit to which Mr. Barry said: Well, we have  
19 already kind of did that. And I said: Well, I'm going to give  
20 you a chance. We are going to do an evidentiary hearing, but  
21 we are going to start off with an affidavit instead of putting  
22 somebody on the stand and we listen for 8 hours or whatever it  
23 is.

24 So they are not bound by that disclosure. That disclosure  
25 was intended as a prima facie disclosure. Now, if he wants to

1 rest on that, that's fine. And we got what we got. I'm not  
2 going to say you can't add anything to that. I'm indicating  
3 that there was a lot of back and forth, as you say. And one of  
4 your filings was: Look at opinion number X. There was no  
5 footnote to it. And I have described that.

6 **MR. SABELLI:** So let me question the assumption that  
7 this is going to be more efficient. Because just playing it  
8 out, what I think is going to happen is we will get an  
9 affidavit in the Court's proposal. We will do a cross.

10 In the cross we will point out we don't know the identity  
11 of such-and-such a person or we don't have this particular  
12 report. And then we will just have to have another interrupted  
13 hearing with another level of disclosure from the Government  
14 and we will have to come back again.

15 And that's the kind of thing you can take care of with an  
16 expert on the stand being questioned on a direct examination.

17 **THE COURT:** He will be on the stand for cross. You  
18 can ask him, you know, what is -- give me more information  
19 about the basis of X. You have identified -- did you know that  
20 person was a convicted perjurer or whatever.

21 There is not -- I'm not going to pause again and let  
22 Mr. Barry come back with another affidavit. Oh, well, I'm  
23 going to -- no, this is it. I'm saying the opening will be on  
24 paper rather than oral.

25 **MR. SABELLI:** And if on the cross-examination a new

1 basis or new information is proffered by the Government expert,  
2 that's too late, I assume, because --

3 **THE COURT:** I don't know. I don't know about that.  
4 Why would it necessarily be -- I don't know.

5 **MR. SABELLI:** Because the focus of a direct  
6 examination and the purpose of the pre-hearing disclosures is  
7 for the Defense to prepare to cross examine.

8 **MR. BARRY:** Your Honor, this is Kevin Barry again.

9 There is one note to the proposed affidavit, the  
10 Government would like the opportunity for redirect as well to  
11 follow up on.

12 **THE COURT:** There would be redirect and recross and  
13 like -- we would handle it like anything else. It is not going  
14 to save an evidentiary hearing. It is not going to save being  
15 in court, whether this is live or virtual; but it will  
16 certainly, I think, make things more effective especially since  
17 one of the things that Defense Counsel wants is to be able to  
18 bring a transcript and give it to clients and go over it.

19 And, well, we will have the affidavit. That is a  
20 transcript. I mean I'm not -- so -- it is like a transcript.  
21 It is just already done. We don't have to go through the  
22 exercise of having it done via direct examination. Everything  
23 else follows. We would have cross. We would have redirect,  
24 like anything else.

25 We don't have to resolve this right now. I raise this

1 because we are now trying to figure out how this fits with  
2 timing and everything else, but I do want to put that on the  
3 table because if we do decide to move forward and start  
4 litigating these issues, I'm thinking that is one way that we  
5 can move this forward and also meet some of the conditions --  
6 some of the concerns that Mr. Wendt's Counsel has set forth.

7 **MR. BARRY:** Your Honor, this is Kevin Barry.

8 The Government will -- we will do an affidavit. If we can  
9 have six weeks to submit it, we are happy with that proposed  
10 procedure.

11 **MR. BUSTAMANTE:** Your Honor, this is Mr. Bustamante on  
12 behalf of Mr. Hefferman.

13 My understanding -- you can correct me, Your Honor -- is  
14 that just as you just stated, this is a proposed option for  
15 further discussion down the road given the circumstances that  
16 were highlighted on page 3 of our status part 2(b) where we  
17 talk about putting this matter over for the reasons stated.

18 So what I just heard the Court suggest is this is an  
19 option if it can't get resolved between now and possibly the  
20 next time that we meet, and we have an opportunity to meet and  
21 confer and see if the courts open up by June 1st.

22 So is the Court now suggesting that this is a road we are  
23 going to go down with a high degree of certainty or it is still  
24 an option to be discussed down the road?

25 **THE COURT:** Why don't we do this: We are going to get

1 together, it sounds like, mid-June either way. If you are  
2 ready to file that affidavit by then, that's great because --  
3 maybe you don't do anything yet, but let's find out exactly --  
4 I mean, in all likelihood -- whether we have a live hearing, a  
5 virtual hearing -- to me this makes some sense to have the  
6 testimony written out.

7 And we can decide what the timing of the hearing is. And  
8 then you can serve that affidavit shortly thereafter if we  
9 decide to have a hearing, you know, in July or whatever it is,  
10 early August. At least we will be ready to go.

11 What I don't want to do is sort of do nothing. And then  
12 decide in June, okay, let's go forward with a hearing starting  
13 with the affidavit. And then the Government says: Well, then  
14 we need six more weeks. And by that time we are in August just  
15 to start the process.

16 And if we are actually looking at a December trial date,  
17 that is going to be tight. So I think what I would like to do  
18 is -- we don't have to make a final decision yet on exact  
19 timing and form of the hearing -- of the Daubert hearing, but  
20 my intent is to have it move forward shortly thereafter. And  
21 the Government can wait until that hearing to file the  
22 affidavit.

23 **MR. BARRY:** Thank you, Your Honor.

24 **THE COURT:** In all likelihood, that's the direction  
25 I'm going to go -- whatever the timing -- it seems to me to

1 make sense.

2 And I will say I guess the one thought -- the point that  
3 Mr. Sabelli made, and that is -- that affidavit should contain,  
4 you know, all the bases that the expert is going to use and  
5 not -- if he decides to come up with something or comes up with  
6 something that is new and different, there is a chance that  
7 that is going to be beyond the scope. So we should treat it as  
8 direct. You know, put in everything you got is my advice.

9 **MR. BARRY:** I understand, Your Honor, thank you.

10 **THE COURT:** Okay. So let's -- now, we talked about  
11 there is a problem with the scheduling date in June, somebody  
12 mentioned?

13 **MR. THOMSON:** Your Honor, this is James Thomson. I  
14 would like to just kind of start this thing off because I  
15 worked with the courtroom deputy about possible dates. And  
16 then I will get off the phone with you.

17 I found out that the dates that are available are  
18 June 23rd, June 26th, June 30th and then July 17th and  
19 July 24th. I did a poll of -- actually several polls of  
20 Defense Counsel and the U.S. Attorney to try to find out dates  
21 that were, you know, agreeable to all.

22 The last round of that poll came out much too soon and too  
23 quick to the court appearance, so I wasn't able to get all of  
24 the answers for all of the clients. But if we do them  
25 chronologically, June 23rd, there are two Counsel that say no

1 to and then several who have not responded. June 26th, there  
2 are four counsel that say no to. And June 30th there is one  
3 counsel that has said no to but several that have not  
4 responded. July 17th, everyone is agreeable to attend with the  
5 exception of one counsel who I did not hear back from. And  
6 July 24th, it looks like all but one -- although that is me. I  
7 can probably rearrange my schedule on that one -- is agreeable.

8 So I don't know about June 30th or June 26th for the  
9 missing people or June 23rd for the missing people.

10 **THE COURT:** June 23rd is a Tuesday. That is a day  
11 that we have time slots although I don't know with Santa Rita.  
12 I'm just thinking in terms of, you know, the interests of those  
13 who are detained to be able to listen in. I don't know whether  
14 we can get -- 23rd, you say there are two counsel --

15 **MR. THOMSON:** There are two counsel -- Mr. Novak and  
16 Mr. Walsh -- who cannot attend on that date. And then there  
17 are one, two, three, four, five counsel that I have not heard  
18 back from.

19 **MR. WALSH:** Your Honor, this is John Walsh on behalf  
20 of Christopher Ranieri. I can make the 23rd. I will just have  
21 to rearrange something.

22 **OTHER ATTORNEY:** So there is one counsel who said --  
23 Mr. Novak said he cannot. I don't know about Mr. Waggener or  
24 Ms. Morrissey on the 23rd, Your Honor.

25 **MR. NOVAK:** Your Honor, this is Richard Novak. With

1 respect to the 23rd at the moment, I'm supposed to start  
2 selecting a jury before District Judge Kronstadt in Los Angeles  
3 on that day. I believe that matter will be postponed, but I  
4 can't make that representation at this point.

5 **THE COURT:** All right.

6 **MR. WAGGENER:** Mr. Waggener for Mr. Ott, I'm available  
7 on June 23rd.

8 **THE COURT:** Okay.

9 **MS. MORRISSEY:** Marcia Morrissey for Mr. Ott as well,  
10 and I am available on June 23rd.

11 **THE COURT:** All right.

12 **MR. THOMSON:** The only other person who was missing  
13 was Mr. Boisseau.

14 **MR. BOISSEAU:** I'm available June 23rd.

15 **MR. THOMSON:** I don't mean missing. In fairness  
16 again, Your Honor, the last poll got sent out late. Some  
17 people didn't get a chance to respond to me. I'm not saying  
18 anybody didn't return my call, so to speak. Ms. Pollack was  
19 the other person I didn't get a response from.

20 **MS. POLLACK:** The 23rd?

21 **MR. THOMSON:** The 23rd.

22 **MS. POLLACK:** I'm available.

23 **MR. THOMSON:** And then Mr. Clough?

24 **MR. CLOUGH:** Sorry. I thought I responded that I  
25 would accommodate whatever schedule everybody said. That was I



1 think the first response I sent back.

2 **MR. THOMSON:** I may not have seen that. I apologize,  
3 Mr. Clough.

4 So that means with Mr. Novak -- with Mr. Novak's  
5 situation, everyone is available on the 23rd.

6 **MR. NOVAK:** Your Honor, let me add one more thing, if  
7 I may. This is Richard Novak.

8 I don't know exactly what the agenda will be on June 23rd.  
9 And, of course, I have very able co-Counsel who could represent  
10 Mr. Nelson.

11 The next day June 24th is the next scheduled hearing  
12 before Judge Koh in the matters of Mr. Chavez and Mr. Scheetz,  
13 and I cannot make any formal representations about what will  
14 happen; but Judge Koh has opened up a conversation, if I can  
15 call it that, about whether a very detailed scheduling order  
16 which leads to a trial in July -- which I have told the Court  
17 about -- whether that will hold.

18 So I just want the Court to know that it may be on  
19 June 24th I can give Your Honor -- after June 24th, I should  
20 say, I can give Your Honor more information about Judge Koh's  
21 plans for us in that matter.

22 It may be that meet-and-confers and some stipulation  
23 before that resolve that before the 23rd, and I don't really  
24 want to say too much because I'm going to get into some Rule 6  
25 issues. And Government Counsel on that matter aren't here.

1 I just want to say there is a conversation, but there is  
2 certainly no agreement about that.

3 **THE COURT:** Well, I think we should go forward with  
4 the 23rd. You will know hopefully something. You may or may  
5 not know definitively. It may or may not affect -- we  
6 understand you have a tentative trial date in July with Judge  
7 Koh. I think by the 23rd you are going to have a pretty good  
8 sense where that is -- where that might be going.

9 **MR. NOVAK:** And I will endeavor in that direction but  
10 I just -- I don't know. That's all.

11 **THE COURT:** Well, it seems to me --

12 **MR. THOMSON:** Your Honor, I did not contact the  
13 courtroom deputy about the timing or the time of the hearing,  
14 but we did work on that date at least.

15 **THE COURT:** Angie, the afternoon -- I mean, that would  
16 coincide with -- if we can try to get those who are detained in  
17 Santa Rita plugged in -- that at least opens the possibility we  
18 can reserve some time there. So it would be in the afternoon.

19 Angie, you are on mute. Do you want to chime in?

20 **THE CLERK:** I will have to get a time slot available.

21 **THE COURT:** All right. But presumably it would be  
22 somewhere around 1:00 or 1:30, somewhere in the afternoon. If  
23 all of you can keep your calendars clear for the afternoon, it  
24 will probably be around 1:00 or so. We will try to -- I assume  
25 it is your preference -- those of you who have clients in Santa

1 Rita -- be able to participate?

2 **MR. SABELLI:** Yes, Your Honor.

3 **THE COURT:** All right. Well, we will work and see if  
4 we can try to do that. And so at that point you will now --  
5 you will have then had the additional disclosures and materials  
6 and talk about a pre-litigation schedule and about potential  
7 groupings.

8 And I guess I forgot to ask. I take it there is still no  
9 word from Washington D.C., Mr. Barry?

10 **MR. BARRY:** This is Kevin Barry.

11 That's correct, Your Honor. We check in every week. The  
12 response today is status quo unfortunately. As soon as I hear  
13 either way, I will certainly let all the parties and Court  
14 know.

15 **THE COURT:** All right. Well, we will have more  
16 information then. I will be prepared and I think the parties  
17 will be prepared with a concrete proposal as to how we go  
18 forward. And I'm particularly interested in even before then,  
19 I guess, you are proposing May 11th to develop a pretrial  
20 litigation schedule? I think that will be very helpful as  
21 well.

22 **MR. SABELLI:** Yes, Your Honor. We asked for ten days.  
23 We should be able to turn it around in that timeframe.

24 **THE COURT:** All right. Is there anything else that we  
25 need to discuss today?

1           **MR. PHILIPSBORN:** Your Honor, this is Philipsborn on  
2 behalf of Mr. Wendt.

3           Just -- I think, more than anything so that we have  
4 placeholders on our arguments on this, for the record, we have  
5 already submitted all of these arguments in writing -- we are  
6 reiterating our motion that you set an NOI date for all of the  
7 reasons that have already been argued.

8           The only additional matter that I wanted to tender  
9 again -- more in the spirit of place-holding or providing the  
10 Court information to avoid problems down the line -- like some  
11 other Counsel on this call, I am answering to other courts  
12 including the court -- a state court that thinks it might try  
13 to select a capital case jury in Marin County in the beginning  
14 of July.

15           The only reason I bring that up is, first of all, the  
16 Judge in that case knows that I have asked for time off to  
17 attend hearings before you and is -- has that under  
18 consideration. But the main concern is if we don't actually  
19 try to get a decision or -- for that matter as the Wendt team  
20 has tried to do -- force the decision on the elephant in the  
21 room on the death penalty issues, I think the Wendt team has  
22 concern that if we happen to be wrong on the probability of an  
23 authorization in this case and the Government actually goes  
24 forward with an authorization process, Brian Wendt and his  
25 Defense team don't want to be caught in the position in which,

1 you know, the lawyer he has who has some death-penalty related  
2 litigation experience and actual authorized death cases is  
3 essentially taken off the table by the passage of time at a  
4 time at which I should have been participating in the  
5 authorization process.

6 So to come in for a landing, if you are not going to -- if  
7 we are not actually going to follow through -- and I understand  
8 there are logical and factual reasons for you to move the  
9 further discussion about trial dates and other related matters  
10 down the line -- again, I would hope that you would set an NOI  
11 date today.

12 But if you are not inclined to do that, I would ask that  
13 we re-visit the discussion at the next calling of the case  
14 because -- for all of the reasons stated. And I think it is  
15 still our view that -- you know, as I have said several times  
16 before, both as provided for in the death-penalty protocols  
17 themselves, the DOJ's death-penalty protocols, and also by  
18 common experience among death penalty lawyers -- it has an  
19 amazingly motivating effect on DOJ when a district court judge  
20 issues a -- an order on an NOI, and we really are at that  
21 point.

22 I submit the matter.

23 **THE COURT:** All right. As I indicated last time, I  
24 was prepared and I am prepared to set an NOI date once we have  
25 a trial date. I already warned the Government of a short fuse;

1 once we set the trial date, if that trial date is December or  
2 January or somewhere in that timeframe, there is going to be a  
3 short fuse. But I looked at the case law and don't see any  
4 authority at this point to set one that is not tied to or  
5 anchored in any way to a trial date.

6 And so for all the reasons why I think the -- you know, we  
7 want to move this forward, and I think you have indicated on  
8 behalf of your client, you wanted to have an early trial date,  
9 that was my command.

10 So I am prepared to set that date, NOI date, if we set a  
11 trial at the next calling of the case. And as I indicated  
12 before, it will be a short time fuse because I think I can set  
13 that date fairly substantially in advance of the actual trial  
14 date. I'm not afraid to set that in advance once I have a  
15 trial date.

16 **MR. NOVAK:** Thank you, Your Honor.

17 **THE COURT:** Okay. Anything else?

18 **MR. WAGGENER:** Robert Waggener on behalf of Mr. Ott,  
19 Your Honor.

20 I filed a status report regarding some discovery issues  
21 that the Government and I and Defense Counsel are working out.  
22 I'm not going to get into the weeds in terms of the particulars  
23 of that because we have some continuing dialogue. But, you  
24 know, the big issue that is going to come up that is not going  
25 to be resolved with that dialogue is going to be the timing of

1 the disclosure of certain items and whether they are done at  
2 the time the Government produces a witness list or some time  
3 beforehand by AEO or otherwise.

4 That is going to be a big issue. And I don't know whether  
5 the Court wants to take that up now or plan to do that on  
6 June 23rd but whether it might be something that we go back to  
7 Magistrate Beeler to discuss.

8 **THE COURT:** We have been working with Magistrate  
9 Beeler. She has an overall sense of things, and I would like  
10 you to go to her. I will speak with her.

11 I understand the importance of getting some of these  
12 disclosures, and I understand the Government's concern too.  
13 But it seems like up until now we have been able to work out a  
14 lot of things through the AEO procedure. And I think that is  
15 something we can work out as well. But if you would go back  
16 and make sure that Judge Beeler is plugged into this process,  
17 that would be helpful as well.

18 All right. So we will set the exact time once we get the  
19 time slots from Santa Rita but afternoon of the 23rd for the  
20 status. And hopefully we can close the loop on some of these  
21 outstanding matters and get a clear sense of back to trial  
22 groupings timeline and everything else.

23 **MR. BARRY:** So, Your Honor, this is Kevin Barry for  
24 the Government.

25 I think that the time is excluded automatically through

1 the pendency of Mr. Wendt and Mr. Nelson's motions to exclude  
2 the experts; but, you know, there still is the need to review  
3 the discovery that has been produced and will be produced.

4 I believe the case is still complex. So I wonder if the Court  
5 will enter an order excluding time on this basis -- I think it  
6 will automatically be excluded but just in an abundance of  
7 caution.

8 **THE COURT:** Any objection by anybody to -- for further  
9 exclusion of time?

10 **MS. POLLACK:** No, Your Honor.

11 **MR. BOISSEAU:** No.

12 **THE COURT:** All right. It appears that all Counsel  
13 agree. And, Mr. Barry, if you can prepare a time exclusion  
14 order for the record, I appreciate it.

15 So time will be excluded on the bases that were stated;  
16 that there is a pendency of a motion. Time needed for  
17 effective preparation of Defense given the outstanding matters  
18 that still need to be produced by the Government and reviewed;  
19 the extent of the materials that still need to be reviewed by  
20 Counsel and given the complexity of the case.

21 Time is excluded. Find that the ends of justice outweighs  
22 the public's and the Defendants' interest in a speedy trial.  
23 The time is excluded until the next calling of the case which  
24 is June 23rd.

25 All right. If there is nothing further, we will adjourn.



1           **MR. BARRY:** Thank you, Your Honor.

2           **MR. SABELLI:** Thank you, Your Honor.

3           **MR. WALSH:** Thank you, Your Honor. John Walsh on  
4 behalf of Mr. Ranieri, and I ask that his presence at the next  
5 calling be excused.

6           **THE COURT:** All right. It will be waived. Thank you.

7           **MR. WALSH:** Thank you.

8           **THE CLERK:** Court is adjourned.

9                   (Proceedings adjourned at 2:38 p.m.)

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11                               **CERTIFICATE OF REPORTER**

12                   We certify that the foregoing is a correct transcript  
13 from the record of proceedings in the above-entitled matter.

14  
15          DATE:    Wednesday, September 2, 2020

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20                               Marla F. Knox, RPR, CRR  
21                               U.S. Court Reporter  
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